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No. 709

In the Supreme Court of the United States

OCTOBER TERM 1962

KENTS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 1–4) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered June 6, 1962 (Pet. App. B). Timely motions for rehearing were denied on October 3, 1962 (Pet. App. D). The petition for a writ of certiorari was filed on December 31, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims' finding that just compensation for the taking of an easement to underflood a mineral deposit was $30,000 is supported by substantial evidence.

STATEMENT

Diatomite is a material which, after processing, is used for filter aids, fillers, absorbents, etc. Plaintiff owned in fee or held under lease some 1,055 acres of land in Washington containing an estimated 1,563,080 tons of diatomaceous earth deposits. It claimed that as the result of the Columbia River Basin project, the reservoir of which is located some 44 to 52 airline miles from plaintiff's property, the deposits were wetted and their commercial value thereby destroyed. Large values, ranging up to $15,000,000, were claimed by the plaintiff. The United States offered expert evidence indicating loss in value of some $31,000 based on sales of diatomite land, including purchases by the plaintiff as late as 1956 (see Finding 110, Pet. App. 58–59).

In Findings 108 and 109 (Pet. App. 56–58), the plaintiff's evidence based on the theory that its business, not merely the pertinent land, was taken and should be valued, is described. The Court of Claims stated (Pet. App. 3):

> It is difficult to accurately measure the damages which have been caused to plaintiff's land. But, from the testimony as a whole, we have arrived at $30,000 as the amount which will compensate plaintiff for the decrease in the fair market value of its land—both that held in fee and by lease.

ARGUMENT

The court below applied the correct and well-settled principle that just compensation was to be determined by the difference in the market value of petitioner's land—not its business—before and after the taking. It is also evident that the Court of Claims' finding on this point is supported by the evidence.

Although petitioner does not acknowledge the fact, its real argument appears to be that it should be compensated as if its business had been taken. This is the hypothesis of the evidence it cites. See Findings 108 and 109, Pet. App. 56–58. But plainly there was no taking of its business and the evidence it discusses was irrelevant. Under the findings, what has been taken is an easement to underflood plaintiff's lands. The compensation payable for such a taking is measured by the extent to which market value of the land has been decreased by imposition of the easement. *United States* v. *Causby*, 328 U.S. 256; *United States* v. *Kansas City Ins. Co.*, 339 U.S. 799. Compensation is paid only for the property taken and does not include "loss of profits, damage to good will, the expense of relocation and other such consequential losses," evidence of which is not even admissible in federal condemnation proceedings. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377–378; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 281.

Mitchell v. *United States*, 267 U.S. 341, cited by petitioner, answers its claim. There it was claimed that a canning business was destroyed by the taking of lands upon which was grown a special quality of corn. This

Court held that, while the special adaptability of the land for growing that corn could be considered, the canning business was not taken and the losses or destruction of the business constituted simply consequential damages (267 U.S. at p. 345). So here, the extent, if at all, that losses to plaintiff's processing business were produced as a consequence of wetting the deposits was irrelevant to the award of just compensation.

CONCLUSION

It is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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